BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN C. BROWN	)	
Claimant	)	
VS.	)	
	)	Docket No. 268,548
HACKNEY & SONS, INC.	)	
Respondent	)	
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO. and	)	
PMA INSURANCE GROUP, C/O	)	
GALLAGHER BASSETT SERVICES, INC.	)	
Insurance Carriers	)	

ORDER

Respondent and its two insurance carriers appeal from the May 16, 2002 preliminary hearing Order entered by Administrative Law Judge (ALJ) Jon L. Frobish.

ISSUES

Claimant alleges he suffered injuries to his feet through a series of accidents that occurred each and every working day from December 1, 1999 until his last day of work on November 3, 2000. Judge Frobish granted claimant's request for temporary total disability compensation and medical treatment.[1] Respondent and its insurance carriers contend that claimant's condition and need for medical treatment is not work-related. Rather, his foot ulcers are the result of his diabetes and venous insufficiency conditions. Claimant counters that his foot ulcers and need for medical treatment are a direct consequence of his work with respondent. The issue for Appeals Board review, therefore, is whether

[1] Liability for those benefits was assessed against the insurance carrier on the risk at the time the need for the benefits accrued.

claimant's need for preliminary hearing benefits is due to accidental injuries that arose out of and in the course of claimant's employment with respondent.

FINDINGS OF FACT

1. Claimant, a welder, worked for respondent from February 15, 1999 until November 3, 2000. His job required prolonged standing. In December 1999 claimant began to suffer from foot ulcerations. Initially, claimant thought they were blisters from his work boots. It was not until April 2000, that claimant was diagnosed with diabetes and chronic venous insufficiency.

2. Claimant was taken off work for a period of about six months, from April to October 2000. During this time the ulcers healed and claimant was released to return to work.

3. When claimant returned to work with respondent in October 2000 it was with restrictions, including not being on his feet more than 45 minutes out of every hour. Claimant was placed in an area called roofing. This involved putting the roofs on units before they were sent out of the assembly area. Although there is a dispute concerning whether or not this job accommodated claimant's restrictions, claimant was still required to stand for the majority of his work day. Because of the pressure, he again developed problems with his foot. As a result, claimant was again taken off work on November 3, 2000. He has not worked since then. Since being off work claimant's condition has again improved. He no longer has the ulcerations on his foot, but he does have a loss of tissue on the bottom of his foot.

4. Dr. James E. Webb, Jr., D.P.M.,opined "That within a reasonable degree of medical probability Mr. Brown's underlying condition of Diabetes and related left lower extremity condition was aggravated, worsened, and/or accelerated by his work activities which required constant standing on his feet." Dr. Webb further said, "That within a reasonable degree of medical probability, the above stated restrictions are reasonable and necessary for the care and treatment of Mr. Brown's work related injuries that were sustained due to his repetitive standing and walking activities at Hackney & Sons, Inc., which were part of his daily job activities." [2] Dr. Webb's causation opinion is uncontradicted. Unless improbable, unreasonable or shown to be untrustworthy, undisputed evidence is ordinarily regarded as conclusive.[3]

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[2] P.H. Trans., Cl. Ex. 1.

[3] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 197, 558 P.2d 146 (1976).

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7] Claimant is alleging a series of accidents through his last day worked with respondent on Nov. 3, 2000. Claimant is not alleging that the work caused his diabetes or his venous insufficiency condition. Rather, claimant contends that the work aggravated those conditions and caused the foot ulcers.

It is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] "The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition."[9] The record in this case, establishes an injury or aggravation that is a new accident under the Workers Compensation Act.

Based upon the record compiled to date the Appeals Board finds claimant's present condition is compensable as an aggravation of his pre-existing condition. Therefore, the

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[4] K.S.A. 44-510(a); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[5] K.S.A. 44-508(g). *See also in re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[7] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* ___ Kan. ___ (2001).

ALJ's decision to award preliminary benefits against respondent and its insurance carriers should be affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[10]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on May 16, 2002, should be and the same hereby, affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2002.

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BOARD MEMBER

c: Terry J. Malone, Attorney for Respondent and Liberty Mutual Insurance Co.
Stephen J. Jones, Attorney for Respondent and PMA Insurance Co.
Joni J. Franklin, Attorney for Claimant
Jon L. Frobish, Administrative Law Judge
Director, Kansas Division of Workers Compensation

[10] K.S.A. 44-534a(a)(2).